

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBORAH L. BUFFALO

Claimant

VS.

HOME HEALTH CARE SERVICES

Respondent

AND

**KANSAS EMPLOYERS WORKERS
COMPENSATION FUND**

Insurance Carrier

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Docket Nos. 219,508 &
219,509

ORDER

Claimant appeals Administrative Law Judge Jon L. Frobish's October 14, 1999, post award preliminary hearing Order in Docket No. 219,508 and the November 4, 1999, Order Nunc Pro Tunc in Docket No. 219,509.

When this matter went to hearing on October 14, 1999, the parties and the Administrative Law Judge mistakenly listed this as Docket No. 219,508. Docket No. 219,508, which at one time was consolidated with this matter, deals with an injury to claimant's neck, left shoulder and left arm, with injuries occurring on January 3, 1996, and May 31, 1996. The injury in contention here, in Docket No. 219,509, involves an injury to claimant's low back occurring on June 6, 1996. All of claimant's alleged injuries in both docketed cases involve the same respondent and insurance carrier.

The Order issued by the Administrative Law Judge on October 14, 1999, denied claimant's request for additional medical treatment and reimbursement of outstanding medical bills, post award, for the injury to her low back. The Order Nunc Pro Tunc issued November 4, 1999, rectified the clerical error in docket numbers. There was no objection by either party to the Order Nunc Pro Tunc.

ISSUES

This dispute centers around claimant's request for additional medical care and treatment for the low back. The issue is whether the Administrative Law Judge erred in denying claimant's requests for additional medical treatment and reimbursement of outstanding medical bills incurred post award for the low back.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was originally consolidated for the purposes of preliminary hearing on June 3, 1997. Afterward, however, the cases were bifurcated and, on August 27, 1998, an Agreed Award was entered in Docket No. 219,509. In that Award, claimant and respondent stipulated to a 6.5 percent whole body functional impairment as a result of the injuries suffered by claimant to her low back. In a separate award issued by the Administrative Law Judge on March 2, 1998, Docket No. 219,508 was resolved.

On September 28, 1999, claimant filed a motion for additional medical treatment in Docket No. 219,509, alleging her physical condition was deteriorating and she was in need of additional medical care. Respondent contested claimant's request for additional medical care, alleging that intervening employment was the current cause of claimant's ongoing back problems and not the original injury of June 6, 1996.

Claimant was offered an accommodated position with respondent in 1997. That job involved sedentary office work, primarily using the telephone and computer. Claimant refused the accommodated position, stating she was unable to perform the sedentary tasks, which required too much sitting and would aggravate her back condition. Shortly thereafter, claimant moved to Texas.

In early 1998, claimant returned to Kansas and has held several jobs with other employers since that time. At the time of the preliminary hearing, claimant was working in a sedentary office position which required that she sit in front of the computer several hours a day.

In May 1998, claimant began treating with Debbie Bassham, D.O., for problems associated with her neck and mid back. Those problems stemmed from a non-work-related automobile accident.

On September 2, 1998, claimant began receiving treatment from Dr. Bassham for her low back condition, which claimant associated with the long hours required by claimant's current job on the computer with Wind Ridge Apartments. Dr. Bassham, who was not authorized, treated claimant through November 1998. She noted that claimant was experiencing back difficulties due to prolonged sitting and prolonged standing.

The Administrative Law Judge denied claimant ongoing medical treatment, finding that claimant's current condition was a natural progression of her original degenerative disc disease. The Administrative Law Judge questioned whether his original award was supported by the evidence, indicating that claimant may, instead, have had a temporary aggravation to her underlying degenerative disc condition. The Appeals Board will not comment on the original award as that award was resolved with no appeal by either party and is res judicata.

Claimant was examined by Philip R. Mills, M.D., board certified in physical medicine and pain management. In his examination of December 3, 1998, Dr. Mills diagnosed low back pain radiating into the legs bilaterally with a diagnosis of low back sprain with underlying degenerative disc disease and bulging discopathy by history. Dr. Mills felt, based upon the available information and to a reasonable degree of medical probability, that claimant's low back problems were related to the injury of June 1996 with contribution from the underlying degenerative disc disease. The MRI performed on October 9, 1998, at the request of Eustaquio Abay, M.D., and Paul S. Stein, M.D., identified disc space narrowing with a mild central bulge at L1-2 and a loss of hydration at L5-S1 with disc space narrowing and a central bulge.

In proceedings under the Workers Compensation Act, it is claimant's burden to establish claimant's right to an award of compensation by proving the various conditions upon which this right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g). In considering the evidence, the Appeals Board finds the facts in this case to be similar to those found in Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). In Nance, the Kansas Supreme Court considered whether the claimant, who had suffered an earlier back injury, was entitled to additional compensation when his low back condition worsened. The medical testimony in Nance supported claimant's contentions that the worsening of his back condition was related to the original injury. The Court cited the "general and universal rule of workers compensation," that "when an initial medical condition itself progresses into complications more serious than the original injury, the added complications are compensable." *Id.* at 549; 1 Larson, *The Law of Workmen's Compensation*, § 13.11(a) (1996).

The Court went on to quote Professor Larson, who noted:

Moreover, once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. This may sound self-evident, but in close cases, it is sometimes easy to overlook this essentially simple principle.

1 Larson, § 13.11(a), pp. 3-609-16.

In Nance, the Supreme Court cited additional Kansas cases, recognizing that Kansas had adopted this natural and probable consequence rule.

Here, it is acknowledged in the medical records that claimant's condition is worse. Respondent contends it is the more current occupational activities claimant is involved in that are causing this worsening of her condition. The Appeals Board finds, based upon the medical opinion of Dr. Mills, that claimant's ongoing back problems are the natural and

probable result of the June 6, 1996, injury that aggravated her underlying degenerative disc disease.

[W]hen a primary injury under the Workmen's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972).

The Appeals Board, therefore, finds that the Order Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish dated November 4, 1999, clarifying the Order of October 14, 1999, should be reversed to grant claimant additional medical treatment and reimbursement of the outstanding post award medical bills associated with the treatment to her low back.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish dated November 4, 1999, clarifying the Order of October 14, 1999, should be, and is hereby, reversed, and claimant is granted additional benefits in the form of medical treatment and is further granted reimbursement for outstanding post award medical bills associated with the treatment to her low back.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. The job claimant is currently working was found by Dr. Bassham to be the cause of her ongoing problems. Claimant was originally offered a job very similar to this by respondent and refused to accept that offered job, fearing it would require too much sitting and would aggravate her low back condition. Claimant's fears have been realized. She has returned to work with a different employer, performing the same job tasks offered her by respondent. These job tasks are causing her ongoing difficulties and worsening her condition. The medical opinion of Dr. Bassham convinces this Board member that claimant's current problems are not associated with her injury of June 6, 1996, but instead are related to intervening injuries associated with her most recent employment.

This Board member acknowledges that Kansas has recognized the natural and probable consequence rule through a long line of cases. Nance v. Harvey County, 263 Kan. 542, at 549, 952 P.2d 411 (1997). However, the Supreme Court in Nance went on to note that the natural and probable consequence rule does not apply to situations where the increased disability results from a new and separate accidental injury. The rules set forth in Nance apply to situations where a claimant's disability gradually increases from a primary accidental injury. Here, claimant has returned to employment with a different respondent and suffered an aggravation of her preexisting condition. Therefore, Nance is not applicable in this instance, but rather the Supreme Court's holding in Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973), because the present situation constitutes a new and separate accidental injury and should be treated as such. This Board member would, therefore, affirm the decision of the Administrative Law Judge to deny claimant additional benefits in the form of medical treatment and outstanding post-award medical bills associated with the treatment to her low back as they do not stem from the June 6, 1996, injury.

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director